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In the Supreme Court of the United States

OCTOBER TERM, 1986

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, APPELLANTS

v.

FLORIDA POWER CORPORATION, ET AL.

GROUP W CABLE, INC., ET AL., APPELLANTS

v.

FLORIDA POWER CORPORATION, ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL APPELLANTS

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QUESTIONS PRESENTED

1. Whether the Pole Attachments Act of 1978, 47 U.S.C. 224, which regulates the rates that cable television operators can be charged by those who have permitted the attachment of the cable operators' wires to their utility poles, effects a taking under the Fifth Amendment.

2. Whether, if so, the Act violates the Fifth Amendment because it empowers an administrative agency to calculate just compensation for a taking.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following parties participated in the proceeding before the Eleventh Circuit: National Cable Television Association Inc., Cox Cablevision Corporation, Tampa Electric Company, Mississippi Power & Light Company, Alabama Power Company, Arizona Public Service Company, and Acton Corporation.

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OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-20a)[1] is reported at 772 F.2d 1537. The memorandum opinions and orders of the Federal Communica-

[1] "J.S. App." references are to the appendix to the jurisdictional statement in No. 85-1658.

tions Commission and its Common Carrier Bureau (J.S. App. 21a-28a, 29a-35a, 36a-47a) are unreported.

JURISDICTION

The judgment of the court of appeals (J.S. App. 48a-49a) was entered on October 8, 1985, and rehearing was denied on November 12, 1985 (J.S. App. 50a-51a). A notice of appeal was filed on December 10, 1985 (J.S. App. 52a-53a). On January 31, 1986, Justice Powell extended the time for docketing an appeal to and including March 10, 1986, and on March 3, 1986, he further extended that time to and including April 9, 1986, and the jurisdictional statements were filed on that date. Probable jurisdiction was noted and the cases were consolidated on June 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part: "No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. The text of the Pole Attachments Act, 47 U.S.C. 224, is set forth at J.S. App. 54a-56a.

STATEMENT

1. Cable television service requires the transmission of video programming from a central location to subscribers' television sets through the use of coaxial cables and other transmission equipment. Financial, environmental, and local franchise constraints typically require cable companies to utilize space available

on existing poles of telephone or electric power companies to string their cables (S. Rep. 95-580, 95th Cong., 1st Sess. 12-14 (1977)). Accordingly, cable companies historically have entered into leasing agreements with utilities for the rental of space on their poles for a periodic fee.[2] Conflicts arose, however, over the fees charged; the cable operators contended that the utilities exploited their superior bargaining position—resulting from the ownership of the poles and the operators' lack of any alternative placement options—to demand exorbitantly high fees (*id.* at 13).

Since the states had generally not asserted regulatory authority over the pole attachment policies of the utilities (S. Rep. 95-580, *supra*, at 14), the cable operators sought relief from the Federal Communications Commission. The Commission, however, decided (in *California Water & Telephone Co.*, 40 Rad. Reg. 2d (P & F) 419 (1977)) that it lacked authority under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, over pole attachment rates.

In 1978, Congress concluded that "the Federal Communications Commission should fill [this] regulatory vacuum to assure that rates, terms and conditions otherwise free of governmental scrutiny are assessed on a just and reasonable basis" (S. Rep. 95-580, *supra*, at 17). Congress accordingly enacted the Pole Attachments Act, 47 U.S.C. 224, to "creat[e] within the FCC an administrative forum for

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[2] Although most cable television cables are strung above ground on utility poles, about 5% are placed underground in ducts, conduits, or trenches, which are also owned by telephone and electric power companies that permit the cable television companies to use available space (S. Rep. 95-580, *supra*, at 12).

the resolution of CATV pole attachments disputes and [to] prompt[] the several states * * * to develop their own plans free of Federal prescriptions" (S. Rep. 95-580, *supra*, at 14).

The Pole Attachments Act directs the FCC to "regulate the rates * * * for pole attachments to provide that such rates * * * are just and reasonable" (47 U.S.C. 224(b)), unless the state regulates such matters and provides the Commission with an appropriate certification to that effect (47 U.S.C. 224(c)).[3] The statute defines a "just and reasonable rate" as one which provides for the recovery of not less than the additional costs of providing the attachments (the incremental costs) or more than the proportional share of the capital and operating expenses of the pole (the fully allocated costs). 47 U.S.C. 224(d)(1). See S. Rep. 95-580, *supra*, at 19-21.[4]

The legislative history of the Act emphasizes (S. Rep. 95-580, *supra*, at 16-18) that "the matter of CATV pole attachments [is] essentially local in nature, and that the various state and local regulatory bodies which regulate other practices of telephone and electric utilities are better equipped to regulate CATV

[3] The term "pole attachment" is defined to include "any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility" (47 U.S.C. 224(a)(4)). See note 2, *supra*. Because the complaints to date have related to above-ground pole attachments, this brief refers only to such poles. The same principles would, however, apply to shared space in ducts, conduits, or rights-of-way. See note 18, *infra*.

[4] The statute originally limited the effectiveness of the statutory formula to five years (47 U.S.C. (Supp. II 1978) 224(e)). That limitation was deleted in 1982 (Communications Amendments Act of 1982, Pub. L. No. 97-259, § 106, 96 Stat. 1091).

pole attachments" (*id.* at 16). The Commission's jurisdiction was not only to be temporary, until a state acted (*id.* at 28), but also to be limited—it exists only when the utility has voluntarily agreed to permit the CATV pole attachment (*id.* at 15-16),[5] and even then only when "the parties themselves are unable to reach a mutually satisfactory arrangement" (*id.* at 15). Thus, the Commission was not given general rate-making authority in this area (*ibid.*).

2. This case arose out of three contracts entered into by appellee Florida Power Corporation for the leasing of excess space on its poles to cable television companies. Florida Power agreed to permit cable attachments only on poles where, in its judgment, the CATV use "will not interfere with its own service requirements" (J.A. 18, 104, 133, 213): Florida Power also retains the right to reclaim the space whenever it is needed for its own purposes, leaving the CATV company only the option of financing the entire expense of substituting new, taller poles if it wishes to continue its attachment (J.A. 20-21, 106-107, 135-136, 215-216).[6] The contracts were made in 1963 (with Cox Cablevision Corporation), 1977 (with

[5] The Senate committee noted that "access to utility poles does not in itself constitute a problem, among other reasons because CATV offers an income-producing use of an otherwise unproductive and often surplus portion of a plant" (S. Rep. 95-580, *supra*, at 16). The committee did state, however, that it believed that the Commission could determine that any effort by a utility to discontinue providing pole attachment space solely in order to avoid FCC jurisdiction was an unjust or unreasonable practice, and that the Commission could "take appropriate action upon [such] a finding" (*ibid.*).

[6] The contracts provide that the cable operators' use of the space shall not "create or vest in the [operator] any ownership or property right in said poles" (J.A. 31, 118, 147, 224).

Teleprompter Corporation)[7] and 1980 (with Acton CATV Inc.), and provided for annual pole rates ranging from $5.50 in 1963 to $7.15 in 1980 (J.S. App. 3a, 5a-7a).[8]

Teleprompter filed a complaint with the FCC on November 18, 1980, pursuant to the Pole Attachments Act, alleging that the contract rates of $6.51 per pole for 1981 and $6.79 for 1982 were unfair. Acton filed a similar complaint on February 20, 1981, challenging its $7.15 per pole contract rate (J.S. App. 5a-6a). On July 16, 1981, the Commission found that, in each case, an annual per pole rate of $1.79 was the maximum rate that was just and reasonable (*id.* at 7a, 44a). While this decision was pending on agency review, Cox filed its complaint; on March 8, 1982, the Commission applied to Cox its conclusion that $1.79 per pole was the maximum just and reasonable rate for Florida Power's poles (*id.* at 7a, 33a). The applications for review were denied by the agency on September 28, 1984 (*id.* at 8a, 21a-28a).

3. Appellee Florida Power petitioned for review of the final Commission order, pursuant to 47 U.S.C. 402(a).[9] It alleged that the Commission's order amounted to a taking of its property without just

[7] Appellant Group W Cable, Inc., is the successor in interest to Teleprompter (J.S. App. 8a).

[8] The contract rate provisions are summarized at J.S. App. 30a n.1, 38a n.2.

[9] Section 402 (47 U.S.C.) provides, by reference to Chapter 158 of Title 28, for Administrative Procedure Act review of agency decisions of this kind in the court of appeals where the petitioner resides or in the United States Court of Appeals for the District of Columbia Circuit (28 U.S.C. 2342(1), 2343). Florida Power, which resides in the Eleventh Circuit, filed the petition there.

compensation, and asked the court of appeals to set aside that order and remand the case for the Commission "to provide constitutionally just compensation" (FPC C.A. Br. 54).

The court of appeals concluded that *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), compelled the conclusion that the presence of cable TV wires on Florida Power's poles constituted a permanent physical invasion, and thus a taking of Florida Power property under the Fifth Amendment (J.S. App. 14a). The court did not, however, reach Florida Power's claim that the rate prescribed by the Commission was constitutionally inadequate. It decided instead that the determination of just compensation is "solely within the parameters of the judicial function" (*id.* at 15a), and may not constitutionally be delegated at any stage to a nonjudicial agency. The court accordingly held that the Pole Attachments Act is unconstitutional because it "does not [properly] allow for a judicial determination of just compensation" and instead permits that determination to be "made by an administrative agency at the behest of Congress" (*id.* at 19a).

SUMMARY OF ARGUMENT

Rate regulation does not implicate the Just Compensation Clause, so long as the rates imposed are not confiscatory. The Pole Attachments Act exemplifies such permissible regulation. It was enacted to provide a federal forum for the resolution of disputes arising out of voluntarily made pole attachment agreements in the absence of a state's assertion of jurisdiction over such agreements. The exercise of this traditional regulatory jurisdiction is not subject to Just Compensation Clause analysis. *Loretto* v. *Teleprompter*

Manhattan CATV Corp., supra, is not to the contrary. In contrast to the statute at issue in *Loretto,* the Pole Attachments Act gives no cable operator any right to attach equipment to the property of another, or to remain in any space the utility needs for its own purposes. Thus, the regulatory controls at issue here are far more analogous to the rent controls distinguished in *Loretto* and in *Fresh Pond Shopping Center, Inc.* v. *Callahan,* 464 U.S. 875 (1983), than to the *Loretto* situation.

In any event, if the Pole Attachments Act does involve a "taking" subject to the Just Compensation Clause, it provides for constitutionally adequate compensation. There is no constitutional impediment to the statutory requirement that the Commission determine a "just and reasonable" rate (47 U.S.C. 224(b)), even though the statute defines that rate as not exceeding fully allocated costs (47 U.S.C. 224(d)). In the first place, the court of appeals plainly erred in interpreting this Court's precedents as precluding any agency participation in the determination of just compensation, and appellees do not attempt to support that interpretation. Moreover, there is no unconstitutional restriction on judicial review of the agency determination, nor is there any practical impediment to such review.

ARGUMENT

I. THE POLE ATTACHMENTS ACT DOES NOT EFFECT A TAKING OF APPELLEE FLORIDA POWER'S PROPERTY

A. The Statutory Preclusion Of Unjust And Unreasonable Rates Does Not Implicate The Just Compensation Clause

It has long been established that "when private property is devoted to a public use, it is subject to public regulation" (*Munn* v. *Illinois,* 94 U.S. 113, 130 (1876)), and that neither before nor after the adoption of the Fourteenth Amendment was it "supposed that statutes regulating the use, or even the price of the use, of private property, necessarily deprived an owner of this property without due process of law" (*id.* at 125).[10] Instead, so long as it is imposed with procedural propriety and without invidious discrimination, rate "[r]egulation may, consistently with the Constitution, limit stringently the return recovered on investment, for investors' interests provide only one of the variables in the constitutional calculus of reasonableness." *Permian Basin Area Rate Cases,* 390 U.S. 747, 769 (1968). Accord, *FPC* v. *Hope Natural Gas Co.,* 320 U.S. 591, 601 (1944). So long as the rates established are not confiscatory, there is no viable objection based on the Just Compensation Clause. *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 51 (1936); *Permian Basin Area Rate Cases,* 390

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[10] Indeed, the Court in *Munn* v. *Illinois, supra,* traced the acceptance of the propriety of public regulation of the charges for use of private property to "the third year of the reign of William and Mary" (94 U.S. at 129).

U.S. at 769-770. See also *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 603-604 (1942) (Black, Douglas & Murphy, JJ., concurring).

In a manner entirely consistent with these principles, the legislative history of the Pole Attachments Act points out that the regulation of pole attachment rates falls comfortably within traditional state and local regulatory authority (S. Rep. 95-580, *supra*, at 16-17):

> The [Senate] committee considers the matter of CATV pole attachments to be essentially local in nature, and that the various state and local regulatory bodies which regulate other practices of telephone and electric utilities are better equipped to regulate CATV pole attachments. Regulation should be vested with those persons or agencies most familiar with the local environment within which utilities and cable television systems operate. * * *
>
> [T]he framework for such state and local regulation is already in place. CATV systems and electric power and telephone utilities are subject, in varying degrees, to local or state regulation in numerous ways. State and local public service commissions and other agencies already possess a wealth of experience in regulating intrastate power and telephone companies. CATV systems are granted franchise permits from the officials in the communities in which they operate. Several States have cable television commissions which perform regulatory functions in addition to those performed by the community franchising authorities.

The court below specifically reserved the question of the extent of the power of a "state agency charged with the responsibility of regulating the power company as a public utility" (J.S. App. 20a). But surely such an agency could, under the authorities cited above, establish reasonable rates to be charged by appellees for pole attachments as a part of its general rule-making authority without running afoul of the Just Compensation Clause.[11] The utility's total annual revenue is typically fixed by the state agency to reflect its perceived overall revenue requirements. Funds derived from pole attachment fees help defray costs that would otherwise be borne by the utility's customers. The determination of the proper allocation of costs between different kinds of utility customers is the essence of the business of utility regulatory agencies. In this context, the cable companies are in effect simply another kind of customer, and state regulation of the rates charged them by the utilities would be no less consistent with the Just Compensation Clause than is any other component of the state rate regulation scheme.[12]

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[11] Alternatively, if the regulation of the attachment fees were imposed by a local authority as a condition of permitting the utility to construct its poles on public property in the first instance, there could scarcely be a legitimate "taking" claim.

[12] Appellee Florida Power argues (Mot. to Aff. 15) that in leasing space on its poles it is acting not "in its role as a public utility rendering electric service to the public, but rather in its non-utility role as a renter of space on its property * * *." The suggested distinction is overdrawn and wholly immaterial for purposes of allocating pole costs among the users. As the legislative history points out (S. Rep. 95-580, *supra*, at 18):

> CATV pole attachment ratesetting involves equity considerations. Decisions regarding the allocation of pole costs among users should reflect in some rough sense the ability of cable subscribers and the utilities' customers

Of course, the Pole Attachments Act provides for federal, not state, regulation. But the Just Compensation Clause is not implicated simply because Congress has provided for federal regulation to fill a perceived regulatory gap,[13] and thereby has rounded out the state's scheme of utility rate regulation in a way that the state was free to do itself.[14] In fact, the Commission's authority under the Act is substantially more limited than the authority the state could exercise under the cases cited above. The Commission simply provides a forum for adjudication of claims that contractually established rates are unjust and unreasonable. It has no general rate-making authority; instead, when a dispute is submitted to it for

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to pay for costs which are passed along to them. Another significant equity consideration is the relative importance of each of the respective services to the communities served. Considerations of equity should turn on the needs and interests of local constituents.

In enacting the Pole Attachments Act, Congress thus rejected the notion that the utilities' arrangements with the CATV companies are purely private contracts, unaffected with a public interest. Appellees have offered no reason for overturning this legislative judgment.

[13] Indeed, the Pole Attachments Act expressly provides that the FCC's rate-making authority in this area exists only in the absence of the exercise by the state of such rate-making authority (47 U.S.C. 224(c)(1)).

[14] See *American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 322 n.20 (1953) ("This Court has pointed out many times that the exercise of the federal commerce power is not dependent on its maintenance of the economic *status quo*; the Fifth Amendment is no protection against a congressional scheme of business regulation otherwise valid, merely because it disturbs the profitability or methods of the interstate concerns affected.").

resolution, the Commission determines the maximum reasonable rate, by application of the statutory formula to the particular facts of the controversy before it. This exercise of a traditional regulatory adjudicatory function is far removed from actions of the sort that constitute a "taking" subject to the Just Compensation Clause.[15]

B. This Case Is Not Controlled By *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)

The court below did not dispute the above principles—indeed, it did not even address them. Instead, it simply concluded that this case is controlled by *Loretto* v. *Teleprompter Manhattan CATV Corp.*, *supra*, finding that this case, like that, involves an uninvited permanent physical access to the property of another, and thus necessarily a taking for which just compensation is constitutionally required. J.S. App. 8a-14a. We submit that *Loretto* did not overturn the established distinction between the regulation of rates and takings subject to the Just Compensation Clause, even when the rates at issue are for services that involve some physical occupation.[16]

We note at the outset that the petitioner asserting a property interest in *Loretto* was the owner of an

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[15] Moreover, since the Act directs the Commission to establish "just and reasonable" rates, it evidently comprehends the power to raise, as well as lower, rates. Such an enactment is on its face an exercise of the regulatory power, rather than the taking power.

[16] Such physical occupation is not unique to the pole attachment situation. For example, *Munn* v. *Illinois*, *supra*, establishing the existence of regulatory rate-making authority, involved rates for the physical occupation of the petitioner's grain elevator by the rate-payer's grain.

apartment building, not a regulated utility. Loretto's claim to exclude unwanted intrusions onto her building thus implicated the fundamental concerns of the Just Compensation Clause. These concerns are far more attenuated here, where appellees simply object to the regulation of rates they charge for permitting an additional set of wires to be strung on poles they themselves use for precisely that purpose, and only for that purpose.[17]

Moreover, the Pole Attachments Act, unlike the state law at issue in *Loretto*, gives the cable company no right to attach anything to the property of another. The federal Act applies only in those situations where the utility has agreed to give the cable company access to its property, but a dispute has arisen over the terms of that agreement. The Act simply permits the FCC to resolve that dispute by reviewing the terms of the agreement to assure that they are fair to both parties.[18] While the landlord in

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[17] *Loretto* was decided on June 30, 1982. Since that date, several utility companies have challenged the Commission's pole attachment rate orders. See *Alabama Power Co.* v. *FCC*, 773 F.2d 362 (D.C. Cir. 1985) (utility brief filed Feb. 13, 1984); *Duke Power Co.* v. *FCC*, No. 84-2253 (4th Cir.) (utility brief filed Jan. 14, 1985); *Georgia Power Co.* v. *FCC*, No. 84-1107 (D.C. Cir.) (utility brief filed Nov. 5, 1984); *Georgia Power Co.* v. *FCC*, No. 84-1494 (D.C. Cir.) (utility brief filed Dec. 21, 1984); *Georgia Power Co.* v. *FCC*, No. 84-1495 (D.C. Cir.) (utility brief filed Dec. 21, 1984); *Southwestern Electric Power Co.* v. *FCC*, No. 85-1134 (D.C. Cir.) (utility brief filed June 10, 1985); *Texas Power & Light Co.* v. *FCC*, 784 F.2d 1265 (5th Cir. 1986) (utility brief filed Mar. 11, 1985). In none of these seven briefs has the complaining utility suggested that the *Loretto* holding applied in the context of pole attachment regulation.

[18] In 1984, Congress amended the statute to ensure that franchised cable operators would be authorized to use public rights-of-way and easements. Pub. L. No. 98-549, § 2, 98 Stat. 2786, added 47 U.S.C. (Supp. II) 541(a)(2), which provides that:

> Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure—
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> * * * * *
>
> (C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

The precise scope of this new provision is unclear and has not yet been considered by the Commission. The 1984 amendment is, of course, not at issue in this case, in which access was granted as a matter of choice by the utilities.

Loretto could point to a clear interference with her right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property" (*Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979)), appellees here freely chose to contract away that right with respect to the cables at issue. Their objection is simply to the regulation of the terms of the agreed occupation. They assert the "right" to be free of regulation—a far more attenuated right. See *American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 322 n.20 (1953).[19]

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[19] Compare *Delaware, L. & W.R.R.* v. *Town of Morristown*, 276 U.S. 182 (1928), with *Hilton Washington Corp.* v. *District of Columbia*, 777 F.2d 47 (D.C. Cir. 1985). In *Morristown*, the Court declared an ordinance to be invalid under the Just Compensation Clause because it required a railroad company to set aside a portion of its property for use as a regulated

The court below nevertheless concluded that "the cable companies' occupation of Florida Power's poles at the rate specified by the FCC is anything but invited" (J.S. App. 11a), and refused to attach any significance to the fact that Florida Power had made no efforts to exclude any cable company's wires because such an attempt would allegedly have been futile (*id.* at 11a-12a). Nothing in this record supports the court's speculation that Florida Power's failure to attempt a termination of the agreement was in fact due to a belief that the FCC would not permit it.[20] Indeed, since the CATV wires occupy only surplus space on the poles, termination of the arrangement would be contrary to the economic interest of the utility. Cf. S. Rep. 95-580, *supra*, at 16. It is true that the Committee Report expressed the view that a utility might "conceivabl[y]" wish to discontinue an agreement "simply in order to avoid FCC regulation," and that the Commission might properly find such conduct unjust and unreasonable (*ibid.*). The extent of a utility's power to terminate an agreement

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taxicab stand. In *Hilton*, however, regulation of a hotel's taxicab stand was sustained despite a *Loretto*-based attack because there was no governmental compulsion to establish the stand in the first place. Thus, the regulation of the stand, so long as the hotel chose to maintain it, was deemed to be an acceptable restriction on its use rather than a taking of hotel property.

[20] Since FPC never attempted to terminate this agreement, any claim of a taking based on inability to terminate is not ripe for review. *McDonald, Sommers & Frates* v. *Yolo County*, No. 84-2015 (June 25, 1986); *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, No. 84-4 (June 28, 1985), slip op. 13-20; cf. *Agins* v. *Tiburon*, 447 U.S. 255, 262-263 (1980).

is unclear under the Act, and the Commission has not attempted to define the limits of that power.[21]

In any event, the court overlooked the fact that at least one of the contracts involved here was first made two years after the enactment of the Pole Attachments Act,[22] and that Florida Power continued to invite the use of its poles by cable companies in

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[21] The cases relied upon by the court of appeals (J.S. App. 11a) and the appellees (FPC Mot. to Aff. 10 n.10; Intervenors Mot. to Aff. 12-13) are inapposite. In *Telecommunications, Inc.* v. *South Carolina Electric & Gas Co.*, No. PA-83-0027 (FCC Aug. 16, 1983) (Mimeo 5957), the Commission refused to allow a utility to terminate a pole attachment contract with a cable operator on the grounds of alleged safety violations where (a) the irregularities were tolerated until the cable operator threatened to file a rate complaint with the Commission, (b) there was no showing that the irregularities posed any immediate danger, and (c) the cable operator was taking steps to cure the irregularities. The Commission refused to permit the termination because this would have encouraged other utilities to threaten other cable operators with termination to prevent them from filing rate complaints with the Commission, and eviction would have resulted in a loss of service. On basically the same grounds, a stay was granted in *Whitney Cablevision* v. *Southern Indiana Gas & Electric Co.*, No. PA-84-0017 (FCC Nov. 16, 1984) (Mimeo 841), but the case was settled before final adjudication on the complaint. In *David Bailey* v. *Mississippi Power & Light Co.*, No. PA-83-0026 (FCC Sept. 11, 1985) (Mimeo 36118), the Commission ordered a utility, which was subject to FCC jurisdiction under the Act because it had agreed to share its poles with one cable company, to make space available to a second cable company where that company offered to pay all expenses associated with the pole attachments, and there was no showing by the utility of any undue inconvenience associated with the common practice of allowing a second company on the poles.

[22] The Acton contract was entered into on June 16, 1980; the Act was enacted in 1978 (J.S. App. 4a, 6a).

full awareness of the fact that the terms of its contracts were subject to review by the FCC to assure that the fees charged were just and reasonable.[23] The record in this case thus persuasively demonstrates that it is more appropriate to treat the Act's provisions as an implied term of the contracts voluntarily entered into by the utilities, rather than as an unexpected condition sufficient to nullify them.

Even if the court of appeals were correct in its conclusion that it would be virtually impossible for Florida Power to terminate its pole attachment agreements, it does not follow that this case falls within *Loretto*'s "very narrow * * * rule that a permanent physical occupation of property is a taking" (458 U.S. at 441). Quite independently of the question of the terminability of the pole attachment agreements as a whole, each agreement makes clear that the cable operator is permitted access only to surplus space on each pole, and that if the utility needs the space for its own service, it may reclaim it (J.A. 20, 106, 135, 213). Contrary to the assumption of appellees (FPC Mot. to Aff. 11 n.12), there is no reason to suppose that the Commission would find such a provision unenforceable. See 47 C.F.R. 1.1403(a) (requiring utility to provide notice before removing cable facilities pursuant to a condition in agreement).[24]

[23] The Teleprompter contract was finalized on July 1, 1977 (J.S. App. 5a), while the Act was under consideration (*id.* at 4a). Although the Cox contract was initially made in 1963, it provided for a term of at least one year, and was thereafter terminable at will by either party on six months' notice (J.A. 28, 213, 223). Thus, Florida Power was on notice of the potential applicability of the Act when it made or failed to terminate each of these contracts.

[24] Such pole-by-pole displacements are less likely to be retaliatory than decisions to terminate economically beneficial agreements in their entirety. Moreover, since the cable operator retains the option of replacing the pole with a larger one, and thereby retaining the attachment, such displacements do not put the cable operator in the situation of either acceding to the demands of the utility or losing the ability to serve its customers—the situation from which the Pole Attachments Act was designed to protect him.

Accordingly, the utility is not, like the landlord in *Loretto*, deprived of the use of the space involved. There is here simply no " 'practical ouster of [the owner's] possession' " of the kind the Court found significant in *Loretto* (458 U.S. at 428, quoting *Northern Transportation Co.* v. *City of Chicago*, 99 U.S. 635, 642 (1879)). See also *St. Louis* v. *Western Union Telegraph Co.*, 148 U.S. 92, 98-99 (1893) (quoted at 458 U.S. 428-429).[25] Because the cable company's occupation of the space on any particular pole is assured only so long as that space is surplus to the utility's needs, the occupation is not "permanent," as that term is used in *Loretto*.

Indeed, the FCC's regulation of the terms of the rental agreement between the cable operator and the utility is far closer to the type of rent control regulations distinguished in *Loretto* (458 U.S. at 440). This distinction was reaffirmed when the Court dismissed the appeal in *Fresh Pond Shopping Center, Inc.* v. *Callahan*, 464 U.S. 875 (1983), for want of a substantial federal question. As Justice Rehnquist explained in his dissent from that dismissal, in *Fresh Pond* the state court rejected a *Loretto*-based challenge to a local ordinance preventing the eviction of

[25] See also 458 U.S. at 436, 440-441 n.19, emphasizing the distinction between restrictions on the use of property and situations in which the owner "may have no control over the timing, extent, or nature of the invasion." The utility retains significant aspects of such control here.

tenants from rent-controlled property unless the landlord wished to occupy the premises himself. Although Justice Rehnquist concluded that "[t]here is little to distinguish this case from the situation confronting the Court in [*Loretto*]" (464 U.S. at 877), eight Members of the Court showed their disagreement with that view by dismissing the appeal. Here, as in *Fresh Pond*, the utility has rented its property, the rent is controlled,[26] and the utility retains the right to occupy the premises itself. There is, as in *Fresh Pond*, no Just Compensation Clause problem.

II. THE STATUTORY SCHEME PROVIDES FOR A CONSTITUTIONALLY ADEQUATE DETERMINATION OF JUST COMPENSATION

A. The Statutory Standard Is Consistent With The Just Compensation Clause

Even if the court of appeals were correct in holding that the Commission's pole attachment rate order effects a taking of Florida Power's property, there would be no violation of the Fifth Amendment requirement for "just compensation" here. The FCC is empowered by the Act "to hear and resolve complaints concerning [pole attachment] rates," and "to provide that such rates * * * are just and reasonable" (47 U.S.C. 224(b)). The Act states that "a rate is just and reasonable if it assures a utility the recovery of not less than" the incremental costs resulting from the attachment, nor more than the fully allocated costs (47 U.S.C. 224(d)(1)).

[26] Under the *Loretto* analysis, it makes no difference, for Just Compensation Clause purposes, whether the rent controls are imposed before or after the lease is originally signed. See *American Trucking Ass'ns* v. *United States*, 344 U.S. at 322 n.20 (quoted in note 14, *supra*). Cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1004-1014 (1984) (analyzing rational, investment backed expectations before and after change in law). In any event, as we have noted, the agreements at issue here were made or extended in contemplation of the Pole Attachments Act.

Because Congress was establishing a rate regulation system, not providing for the taking of property by condemnation, it did not expressly provide that the "just and reasonable" rate should constitute the measure of just compensation. Nevertheless, here, as in the Emergency Price Control Act considered in *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 124-125 (1950), the statutory standards for the determination of the maximum "just and reasonable" rate[27] are substantially similar to the Just Compensation Clause standard. Accordingly, here, as there, "the congressional purpose * * * require[s] that [the statutory rates] be accepted as the measure of just compensation, so far as that can be done consistently with the objectives of the Fifth Amendment" (339 U.S. at 125). In *United States* v. *Commodities Trading Corp.*, the Court concluded that there was "no constitutional obstacle to treating 'generally fair and equitable' ceiling prices as the normal measure of just compensation * * * [since there was] room for special [judicial] exceptions to such a general rule" (339 U.S. at 128). A similar conclusion is appropriate here.

[27] The Commission regularly determines, as it did here, the "maximum just and reasonable rate" (J.S. App. 44a) that the utility may charge by applying the statutory formula for determining the upper limit of a permissible rate, *i.e.*, the fully allocated costs (47 U.S.C. 224(d)(1)). See *In re Adoption of Rules For The Regulation of Cable Television Pole Attachments*, 72 F.C.C.2d 59, 67-68, 73 (1979).

The recovery of fully allocated costs provides Florida Power with the "just compensation" to which it is constitutionally entitled. *Alabama Power Co.* v. *FCC*, 773 F.2d 362, 367 n.8 (D.C. Cir. 1985); cf. *Permian Basin Area Rate Cases*, 390 U.S. at 770 ("the just and reasonable standard of the Natural Gas Act 'coincides' with the applicable constitutional standards"); *National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, No. 83-1492 (Mar. 18, 1985), slip op. 26 (recognizing that a range of reimbursement amounts would satisfy the Due Process Clause).[28]

B. There Is No Unconstitutional Restriction On Judicial Review

Full judicial review of the Commission's pole attachment order is available in the court of appeals (47 U.S.C. 402(a); 28 U.S.C. 2342(1)), which has the power to set an order aside if it is found to be "contrary to constitutional right"—*e.g.*, inadequate

[28] Appellee Florida Power contends (FPC Mot. to Aff. 17 n.19) that the statutory formula is constitutionally inadequate because it deprives the utility of any appreciation in value of the space involved, and "eliminat[es] all consideration of fair market value." Appellees suggest (*id.* at 20 n.22) that the fair market value of the excess space should be determined by the rental price they were able to demand by virtue of their monopoly position. That is flatly inconsistent with the precise purpose of the statute. Although fair market value has normally been utilized as the standard for determining just compensation, "when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards." *United States* v. *Commodities Trading Corp.*, 339 U.S. at 123; see *United States* v. *Cors*, 337 U.S. 325, 332-334 (1949). There is no constitutional obstacle to the legislature's doing the same thing, so long as judicial review remains available. See pages 23-29, *infra*.

to constitute just compensation (5 U.S.C. 706(2)(B)). Although Florida Power simply sought to avail itself of this right to judicial review, the court of appeals found it unnecessary to consider the adequacy of the compensation on the theory that once a taking is established, any scheme for determining just compensation that involves decision-making by a nonjudicial body is unconstitutional.

The rationale of the court of appeals is without support in the Constitution or in the decisions of this Court[29]; it is not surprising that appellees do not endorse it.[30] The Fifth Amendment simply states

[29] Moreover, if the court meant to limit consideration of just compensation claims to Article III courts, it was rejecting the long-standing jurisdiction of the Claims Court, an Article I court (28 U.S.C. 171(a), 172), to consider such claims. See also Fed. R. Civ. P. 71A(h), providing for trial of issue of just compensation in eminent domain proceedings by commission appointed by court.

[30] Appellees assert (FPC Mot. to Aff. 16; Intervenors' Mot. to Aff. 15-16) that the court of appeals determined that the statute is unconstitutional because it forecloses judicial review. We submit that this assertion overlooks the plain language of the decision, which clearly explains the court's view that the FCC has *no* power to determine just compensation, "a decision which has been jealously guarded as being solely within the parameters of the judicial function" (J.S. App. 15a). Without even mentioning the statutory provisions for judicial review, far less finding them inadequate, the court simply concluded that "[t]he determination of just compensation * * * was constitutionally inadequate in this case because it was made by an administrative agency at the behest of Congress rather than by judicial inquiry as required by law" (*id.* at 19a).

In addition, appellees' interpretation is inconsistent with the court's analysis: if that interpretation were correct, the court of appeals would not have reached the question of the adequacy of judicial review without considering first whether

that "private property [shall not] be taken for public use, without just compensation"; it contains no limitation on the means by which the amount of compensation due may be ascertained. And this Court has long recognized the propriety of permitting nonjudicial bodies to participate in the process. In *Bauman* v. *Ross*, 167 U.S. 548, 593 (1897), for example, the Court stated that the assessment of just compensation may, in the first instance, "be entrusted by Congress to commissioners appointed by a court or by the executive." Cf. *United States* v. *Jones*, 109 U.S. 513, 519 (1883) (just compensation may be determined by "commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate").

More recently, the Court in *United States* v. *Commodities Trading Corp.*, *supra*, held that the Emergency Price Control Act, which required the Office of Price Administration to establish "generally fair and equitable" ceiling prices subject to carefully circum-

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the compensation provided by statute was constitutionally sufficient. "Congress, of course, has the power to authorize compensation greater than the constitutional minimum" (*United States* v. *50 Acres of Land*, No. 83-1170 (Dec. 4, 1984), slip op. 6 n.14). Accordingly, if the maximum rates determined by the Commission under the statutory formula exceed the constitutional minimum, no question of the adequacy of judicial review arises. But although appellees argue (FPC Mot. to Affirm 16-17; Intervenors' Mot. to Aff. 21-23) that the statutory formula does not provide for the constitutionally necessary compensation, the court below found it unnecessary to address that question (J.S. App. 15a).

In any event, even if appellees' interpretation of the court of appeals' opinion is correct, the conclusion that the statutory scheme provides for constitutionally inadequate judicial review is erroneous, for the reasons explained at pages 27-29, *infra*.

scribed judicial review, satisfied the Just Compensation Clause. Surely a statutory provision providing the administrative agency with *more* guidance in determining just and reasonable compensation cannot for that reason be constitutionally inadequate. Cf. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 529-542 (1935).

Indeed, only two Terms ago, this Court upheld against a just compensation claim a statutory scheme requiring the submission of disputes over compensation to binding arbitration before resort to judicial review. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1019-1020 (1984).[31]

The reliance of the court below on *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893), is misplaced. That case makes clear what no one disputes, namely, that in carrying out its ultimate responsibility to decide whether compensation provided is constitutionally adequate, a court is not bound by any attempt by Congress to limit the scope of its inquiry, but must instead review the statutory limitations to determine whether they are consistent with constitutional requirements. But *Monongahela* does not suggest that Congress or an administrative body must be excluded altogether from the process of determining just compensation. It is sufficient that there be an opportunity for full judicial review of

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[31] As the Court explained in *Thomas* v. *Union Carbide Agricultural Products Co.*, No. 84-497 (July 1, 1985), slip op. 7-8, *Monsanto* held that the property owner "must complete arbitration and, in the event of a shortfall, exhaust its Tucker Act remedies against the United States before it can be ascertained whether it has been deprived of just compensation."

any congressional or administrative decisions with respect to compensation.[32]

That opportunity is fully provided here. Pursuant to 47 U.S.C. 402(a) and 28 U.S.C. 2342(1), 2343, a proceeding to review a Commission order in a pole attachment proceeding may be brought in the court of appeals for the circuit in which the petitioner resides, or in the United States Court of Appeals for

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[32] None of the other cases cited by the court below (J.S. App. 16a-18a) supports its holding. In *Miller* v. *United States*, 620 F.2d 812, 837-838 (Ct. Cl. 1980), the court simply applied the principle enunciated in *Monongahela* that Congress cannot circumscribe the ultimate judicial determination of whether the compensation provided is constitutionally adequate by prescribing statutory limits on the amount to be paid. *United States* v. *15.3 Acres of Land*, 154 F. Supp. 770, 783 (M.D. Pa. 1957), summarizes the *Monongahela* holding in affirming a commission award of just compensation. *American-Hawaiian Steamship Co.* v. *United States*, 124 F. Supp. 378 (Ct. Cl. 1954), cert. denied, 350 U.S. 863 (1955), involved a claim for just compensation for the taking of a freighter requisitioned for military purposes, in which the court rejected, for the particular case before it, the rate established by the federal agency for such takings. The court noted that "[t]his court, while giving weight to the administrative determination, must nonetheless determine from the facts proven what it thinks is just compensation" (124 F. Supp. at 383).

Finally, contrary to the implication of the court of appeals (J.S. App. 19a), this is not a situation of the kind warned against in *Isom* v. *Mississippi Cent. R.R.*, 36 Miss. 300, 315 (1858), in which the legislature has attempted to "constitute itself the judge in its own case" by condemning property and determining the amount it must pay for it. Instead, in the Pole Attachments Act Congress provided a neutral forum for disputes between private parties—the utility and the cable company with which it had contracted—and established the formula to be applied in resolving those disputes, without attempting to limit judicial review.

the District of Columbia Circuit. The reviewing court has jurisdiction, without limitation, to enjoin, set aside, suspend (in whole or in part), or to determine the validity of such orders (28 U.S.C. 2342(1)). The court is empowered, "[t]o the extent necessary to decision * * * [to] decide all relevant questions of law, interpret constitutional and statutory provisions * * * [and to] hold unlawful and set aside agency action * * * found to be * * * contrary to constitutional right" (5 U.S.C. 706; see 47 U.S.C. 402(g)).

This judicial review is not circumscribed on its face, and neither the court below nor appellees, when they asked that court in this case to determine the constitutionality of the maximum rates determined by the agency, identified any constitutional inadequacy in the procedure. In fact, this is merely a typical example of the familiar availability of judicial review of administrative rate regulation to assure against the imposition of confiscatory rate requirements. See, *e.g.*, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. at 607.[33] Indeed, judicial review of FCC pole attachment orders has been vigorous.[34]

In this Court, appellees assert that because the record before the Commission is limited to evidence necessary to apply the statutory formula and the court of appeals is limited to reviewing that record, that court cannot perform a constitutionally adequate determination of just compensation. FPC Mot. to Aff. 20-22;

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[33] There is accordingly no need in this case to rely on the availability of a remedy under the Tucker Act, 28 U.S.C. 1491. Cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. at 1016-1019.

[34] See *Texas Power & Light Co.* v. *FCC*, 784 F.2d 1265 (5th Cir. 1986); *Alabama Power Co.* v. *FCC*, 773 F.2d 362 (D.C. Cir. 1985).

Intervenors' Mot. to Aff. 20-23. Nothing in the opinion below suggests that the court of appeals felt itself unable to consider whether the pole attachment rates approved by the Commission provided constitutionally adequate compensation. More importantly, appellees' novel contention is flatly inconsistent with this Court's precedents. For example, in *American Trucking Ass'ns* v. *United States*, 344 U.S. at 320, the Court explained that "[t]his Court has indicated many times * * * that those concerned with an order affecting their just compensation * * * must be heard; indeed, their right to introduce evidence to support the claim that the order in question will unconstitutionally confiscate their property may be enforced even in the [reviewing] Court, if the Commission bars an opportunity to do so." See also *Convoy Co.* v. *United States*, 200 F. Supp. 10, 15 (D. Ore. 1961), aff'd, 382 U.S. 371 (1966) (citations omitted) ("Generally, a court review of administrative action is limited to the record made before the Commission. The only exception to this rule is where it is claimed that the order under attack will unconstitutionally confiscate property. In such case evidence may be introduced at the time of the hearing on review."). Thus, the dilemma posed by appellees simply did not face the court of appeals. If it had addressed the question whether the Commission order provided just compensation to Florida Power, and if it had found the record (as amplified by judicially noticeable submissions) inadequate to resolve that question, it could have received the necessary additional evidence through procedures pursuant to 28 U.S.C. 2347(b)(3). Alternatively, it could have remanded the case to the Commission, directing it to supplement the record. See *FCC* v. *ITT World Communications*, 466 U.S.

463, 469 (1984). Significantly, appellees never requested an opportunity in the court of appeals to supplement the record by either of these means, or indicated any need to do so.

In sum, it is clear that the scheme of regulation established by the Pole Attachments Act is constitutionally sound. It empowers an expert administrative agency to sift through the conflicting (often technical) facts and claims in a pole attachment complaint proceeding, and to make an assessment of just compensation; it also preserves for the judiciary the power to ensure that the statutory formula is not unconstitutionally confiscatory, and that the agency's calculation of just compensation properly applied that formula to the specific circumstances before it.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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